No. 11,568

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO), et al.,
Appellants,

vs.

CABLE A. WIRTZ, as Judge of the Circuit Court of the Second Judicial Circuit, Territory of Hawaii, and MAUI AGRICULTURAL COMPANY, LIMITED,
Appellees.

Upon Appeal from the Supreme Court of the Territory of Hawaii

APPELLANT'S PETITION FOR REHEARING

HARRIET BOUSLOG,
MYER C. SYMONDS,
206 Terminal Building, Honolulu, T. H.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
GEORGE R. ANDERSEN,
240 Montgomery Street,
San Francisco, California,
Attorneys for Appellants.

No. 11,568

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO), et al.,
Appellants,

vs.

CABLE A. WIRTZ, as Judge of the Circuit Court of the Second Judicial Circuit, Territory of Hawaii, and MAUI AGRICULTURAL COMPANY, LIMITED,
Appellees.

Upon Appeal from the Supreme Court of the Territory of Hawaii

APPELLANT'S PETITION FOR REHEARING

Appellants respectfully request the Court to reconsider its decision entered herein on September 27, 1948,[1] and to grant appellants a rehearing in this case on the following grounds:

[1] Extension of time to November 15, 1948 granted by Court to file petition for rehearing.

I

THE DECISION OF THE COURT DOES NOT GIVE EFFECT TO THE PUBLIC POLICY DECLARED IN THE NORRIS-LAGUARDIA ACT, OR INTERPRET THE PROVISIONS OF THAT ACT TO CARRY OUT ITS PURPOSE.

Appellants' contention that the Norris-LaGuardia Act applies to the Territory of Hawaii does not rest merely upon the language of Section 13(d) of the Act on which the Court relies. It rests on the declaration of the public policy of the United States set forth in Section 2 of the Act, and upon each and every provision of the Act. Congress specifically directed the courts to interpret all provisions to carry into effect the public policy which was made positive, substantive law.[2]

The primary objective of the Act is "to protect labor in the lawful and effective exercise of its conceded rights—to protect, first, the right of free association and, second, the right to advance the lawful objects of the association.[3]

The Act accomplishes these purposes in two ways. First, it denies to federally created courts the power

---

[2] Senator Blaine, a drafter and supporter of the bill, a member of the Senate Judiciary Committee, and a member of a special subcommittee of the Judiciary Committee which studied the proposed bill and similar bills and held hearings thereon during the 70th, the 71st and the 72nd Congresses, stated in the debate in the Senate, "When a declaration of public policy goes to the extent of declaring substantive law, then it ceases to be a mere declaration of public policy, but is the enactment of positive, substantive law." (Congressional Record, Vol. 75, Part 5, page 4681.)

[3] Senate Reports 72nd Congress, First Session, Vol. 1 (Dec. 7, 1931 to July 16, 1932), U. S. Govt. Printing Office, Report No. 163 to accompany Senate S935, page 10.

to enjoin certain specified conduct, denies power to enforce in law or equity, so-called "yellow-dog" contracts, and otherwise defines and limits the exercise of the residue of equitable jurisdiction in labor disputes. Second, it legalizes as federal substantive rights the rights of free association, self-organization, designation of representatives, negotiation of the terms and conditions of employment, free from the interference, restraint or coercion of employers of labor or their agents in these rights,[4] and legalizes the right to engage, singly or in concert, in the conduct enumerated in Section 4 of the Act, and enacts as substantive rights the safeguards contained in subsequent sections respecting responsibility for unlawful conduct, the right to jury trials in indirect contempt cases, etc.[5]

The Supreme Court has held that the public policy of the Norris-LaGuardia Act and the purpose of the Act must be given hospitable scope even if meticulous words are lacking, or even though Congress has failed to express its intent in words, or has expressed them only in the situations most likely to

[4] Norris-LaGuardia Act, Section 2. Both the Senate and House Reports call attention to the fact that the statement of public policy creates the same right for all employees as was given to railroad employees in the Railroad Labor Act and sustained by the Supreme Court and enforced in equity in *Texas and New Orleans Railroad Co. vs. Brotherhood of Railroad and Steamship Clerks,* 281 U.S. 584 (1930). See Senate Reports 72nd Congress *op. cit.* pages 11-15, House Reports 72nd Congress, Vol. 2, Report No. 699, pages 5-6.

[5] *United States v. Hutcheson,* 312 U.S. 219, 236, 85 Law. Ed. 788, 795. The Court said, "The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized labor activity as redefined by the later act. In this light, Section 20 removes all such conduct from the taint of being in violation of any law of the United States, including the Sherman Act.

occur to the mind,[6] or even if Congress had no consciousness of intention.[7]

The Court's decision does not give proper weight to the broad purposes of the Act and construes the Act as merely procedural.

It is inconceivable that Congress formulated a public policy of the United States and created clearly defined substantive rights, which it declared neces-

[6] In *United States vs. Hutcheson, supra,* Justice Frankfurter, speaking for the Court, stated:

> Such legislation must not be read in a spirit of mutilating narrowness.
>
> On matters far less vital and far less interrelated we have had occasion to point out the importance of giving "hospitable scope" to Congressional purpose even when meticulous words are lacking. *Keifer & Keifer v. Reconstruction Finance Corporation,* 306 U.S. 381, 391, 59 S. Ct. 516, 519, 83 L. Ed. 784, and authorities there cited. The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit:
>
> A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before. *Johnson v. United States,* 1 Cir., 163 F. 30, 32, 18 L.R.A., N. S., 1194.

[7] In the *Keifer* case cited by the court, in the *Hutcheson* case, it is said:

> This is not a textual problem; for Congress has not expressed its will in words. Congress may not even have had any consciousness of intention. The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy imminent not merely in the single statute from which flow the rights and responsibilities of Regional, but in a series of statutes utilizing corporations for governmental purposes and drawing significance from dominant contemporaneous opinion regarding the immunity of governmental agencies from suit.

sary to prevent involuntary servitude,[8] and yet intended to permit its territorial agents who exercise only legislative, executive and judicial power delegated by Congress to contravene and fly in the teeth of that public policy.

II

IF THE LEGISLATIVE DEFINITION IN 13(d) OF THE ACT IS INTERPRETED TO EFFECT THE PUBLIC POLICY AND PURPOSES OF THE ACT AND TO RENDER MEANINGFUL THE SUBSTANTIVE RIGHTS CREATED, THE WORDS MUST BE GIVEN THEIR NATURAL MEANING RATHER THAN THEIR TECHNICAL MEANING. THE NATURAL MEANING COMPREHENDS ALL FEDERALLY CREATED COURTS, WHETHER UNDER ARTICLE III OR ARTICLE IV OF THE CONSTITUTION, WHOSE JURISDICTION HAS BEEN OR MAY BE CONFERRED OR DEFINED OR LIMITED BY CONGRESS.

Technical words standing alone, or words to which a technical meaning has been ascribed by courts in the past, are generally construed in their technical sense unless a contrary intent is manifested in the Act as a whole. Here, however, the technical words "court of the United States" do not stand alone. To construe the legislative definition, as the court does, in its narrowest possible sense is to reduce the definition to "court of the United States" means "court of the United States."

Congress, in drafting the Act, was concerned—one might say obsessed—with the question of its power. It sought to do its utmost to write the Act so that the

[8] Senate Reports *op. cit.*, p. 9, Debates, *passim.*

Supreme Court would uphold its power to determine public policy and determine jurisdiction of inferior federal courts. This is unmistakeably clear from the history of the Act, the House and Senate Reports, and from the debates. Every Supreme Court decision affecting labor was carefully considered. Congress wanted to be absolutely certain that to the best of its ability, it precluded courts from emasculating and mangling the Act and frustrating its will as courts had done in interpreting the Clayton Act.

The court's rationale that Congress, by the legislative definition, merely wished to extend the scope of the Act to constitutional federal courts created in the future is not supported by the legislative history. Congressional attention was at all times focused on the question of power. The House Judiciary Committee unanimously reported the Act in substantially the form it was enacted. In the Senate, the majority report was agreed to by eleven members and six members submitted a minority report. The minority contended that they were wholeheartedly in accord with the purposes of the Act but feared that some of its provisions might be held unconstitutional, and therefore, narrowed the scope of the bill presented by the majority.

Congress was particularly concerned with the case of *Truax v. Corrigan,* 257 U.S. 312 (1921), in which the Supreme Court held an Arizona anti-injunction act unconstitutional. Congress carefully avoided classification of individuals and dealt with subject matter, that is, rights, in the hope of avoiding what

the Supreme Court found was the infirmity of the Arizona law.

The majority argued that since the Constitution vests in Congress the power to create courts, other than the Supreme Court, Congress had power to abolish such courts as it created. The minority agreed that Congress could abolish inferior courts created by it, but urged that the majority, under Chief Justice Marshall's theory of the inherent power of courts, were going too far in the curtailment of inherent equity power. The majority answered these arguments by pointing out that Chief Justice Marshall's theory had never actually been the law, citing *Cary v. Curtis,* 3 How. 236, and *Myers v. United States,*[9] 272 U.S. 52. The majority also relied heavily on *Michaelson v. United States,* 266 U.S. 42.[10]

---

[9] The Senate Report, at page 10, cites the following statement from the *Myers* case:

> . . . It is clear that the mere establishment of a Federal inferior court does not vest that court with all the judicial power of the United States as conferred in the second section of Article III but only that conferred by Congress specifically on the particular court. It must be limited territorially and in the classes of cases to be heard; and the mere creation of the court does not confer jurisdiction except as it is conferred in the law of its creation or its amendments.

It also quotes the following language from the *Cary* case:

> The judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.

[10] In the *Michaelson* case, the Supreme Court upheld the power of Congress in the Clayton Act to require jury trial in contempt cases growing out of labor disputes.

The majority drafted the legislative definition of courts based on the language in these Supreme Court cases.

Of course, it has never even been suggested that legislative courts as distinguished from constitutional courts are not subject to plenary control by Congress in all respects.

It was clearly then the constitutional issue that focused the Congressional drafters' attention on inferior federal courts created under Article III.

Mr. LaGuardia indicated that Congress was concerned primarily with its power: "This bill does not take one iota of jurisdiction — *because we have not the power* — from state courts, and does not change any state law."[11]

The legislative debates leave no doubt that Congress would have taken jurisdiction from state courts if it had the power, because Congress was adopting as law the dissenting opinions of Justice Brandeis which branded the issuance of labor injunctions a spurious use of equity power and was legalizing the kind of conduct formerly declared illegal by courts, which Justice Brandeis said "reminds of involuntary servitude."

The expert counsel to both the House and Senate committees, Justice Frankfurter, summarized well the attitude of Congress towards labor injunctions:

> In labor cases, however, complicating factors enter. The injunction cannot preserve the so-called status quo; the situation does not remain

[11] Congressional Record, Vol. 75, part 5, page 5478.

> in equilibrium awaiting judgment upon full knowledge. The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike, and resumes them free from the interdicted interferences. Moreover, the suspension of strike acitivities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is later lifted.[12]

There is not one word in the whole legislative history of the Act that indicates an intention to exercise less than the full power of Congress. There is not one word indicating an intention to exclude the federal and local courts of territories from the operation of the Act nor to withhold from the 3,000,000 residents of territories the benefit of the rights created by the Act.

Of course, appellants contend that the full and natural meaning of the legislative definition comprehends the territorial federal district court, and the circuit and supreme courts of the territory, all of which were created by Congress, and whose jurisdiction was and may be conferred *and* defined *and* limited by Congress, whose judges are appointed by the President with the advice and consent of the Senate, and whose salaries are paid by Congress.[13]

If the court believes that the reference to inferior federal courts created under Article III in the Senate and House Reports indicates that Congress was not

[12] Frankfurter and Greene, "The Labor Injunction," page 201.

[13] The Territorial Attorney General has ruled that the salaries of judges cannot be supplemented or added to by the Territorial Legislature.

thinking of, or considering, federally created courts in the territories, it seems to appellants that the Supreme Court's canon of construction of this Act —that even if Congress had no consciousness of intention relating to these courts and omitted meticulous words except as to those courts which came most readily to mind—should be invoked to put into effect in the Territory of Hawaii the public policy of the United States.

The court relies upon the curiously uncodified definition of "courts of the United States" set forth in 50 Stat. 753,[14] to indicate the kind of a statute Congress might have drawn if it intended to include territorial courts within the purview of the legislative definition. This statute, of course, was passed in 1937, five years after the adoption of the Norris-LaGuardia Act. It seems to appellants, however, that if this definition throws any light upon the question here presented, it is that there is no insurmountable obstacle, constitutional or verbal, to describing a territorial court as a "court of the United States." There is just a question of ascribing to the word "of" the sense of belonging, rather than considering the four words "of the United States" in a hyphenated adjectival sense to create technical meaning. (Query whether "courts of record of Hawaii" was intended to include the Hawaiian circuit and supreme courts only, and its Federal District Court was intended to be included in "any district court of the United States," or whether "courts of

[14] Of course, Congress has provided for Hawaii, Alaska and Puerto Rico considerably variegated judicial systems.

record of Hawaii" is intended to include all three. In any event, it is clear that Congress took no chances that any of its creatures should hastily or improvidently interfere with its legislation. It is to be remembered that this Act was passed during the course of the New Deal fight with the Supreme Court over the upholding of measures of broad social policy, such as the Norris-LaGuardia Act, the National Labor Relations Act and the Agricultural Adjustment Act.)

III

CONGRESS ITSELF RECOGNIZED THAT THE APPELLATE PROVISIONS OF THE ACT WERE OF LITTLE MOMENT IN VIEW OF THE NATURE OF THE SUBJECT MATTER, AND HENCE, THE APPELLATE PROCEDURAL SECTIONS RELIED ON BY THE COURT, AS WELL AS THE PROCEDURAL LANGUAGE IN RESPECT TO THE RIGHT OF JURY TRIAL, SHOULD BE GIVEN NO DETERMINATIVE WEIGHT ON THE QUESTION OF THE APPLICATION OF THE ACT TO THE TERRITORY.

We have the word of Senator Walsh of the Senate Judiciary Committee that Congress regarded this procedural appeal section as inconsequential and the substantive rights as all important:

> We have endeavored in the framing of the bill to take care of the matter of appeals as best we possibly can; but no matter what we do about it, the appeal is no relief whatever, as the thing is all ended long before the appeal can be heard either one way or the other. Either the strike prevails or it does not prevail, *so the*

matter of appeal is of no particular consequence. (Cong. Rec. Vol. 75, part 5, p. 4930.)

Assuming an ambiguity in the legislative definition, a failure or defect of a procedural character in respect to appeals cannot properly be used to diminish the scope of the act and destroy substantive rights created by it. Federal courts are always alert to provide a forum to protect substantive rights. If these appellate provisions are inappropriate to territorial courts, the difficulty can be obviated by holding this section inapplicable to this situation[15] or a court direct that the procedure in ordinary cases, i.e., appeal, first to the territorial supreme court from circuit courts, should govern with the expedition features being given effect.

The use of the words "state and district" in Section 11 likewise represent merely the procedural aspects of the substantive right to a jury trial in contempt cases. In the recent decision in the Andres case[16] the Supreme Court found no difficulty in carrying out a uniform policy in respect to death penalties in the Territorial District Court as elsewhere in federal district courts, even though the "meticulous" word Territory was omitted.

---

[15] See Section 14, which provides: If any provision of this Act (Chapter) or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of the Act (Chapter) and the application of such provisions to the other persons or circumstances shall not be affected thereby.

[16] *Andres v. Territory of Hawaii,* 92 Law. Ed. Advance Sheets 790.

IV

THE COURT MISUNDERSTOOD APPELLANTS' CONTENTION WITH RESPECT TO CONDITIONS OF LABOR IN HAWAII IN 1932. APPELLANTS URGED THAT CONGRESS WAS AWARE OF THESE CONDITIONS AND HAD SHOWN THIS AWARENESS BY EXTENDING TO THE TERRITORY EVERY ACT OF NATIONAL LABOR LEGISLATION, SUCH AS THE CLAYTON ACT AND THE RAILWAY LABOR ACT, FROM ANNEXATION IN 1900 TO 1932. THE SAME CONGRESS EXTENDED SECTION 7 OF THE NATIONAL INDUSTRIAL RECOVERY ACT TO THE TERRITORY, AND LATER, THE NATIONAL LABOR RELATIONS ACT AND THE FAIR LABOR STANDARD ACTS. ALL THESE ACTS APPLY TO THE TERRITORY IN THE BROADEST SCOPE POSSIBLE, AND IN A BROADER SCOPE THAN THEY APPLY TO THE STATES. IN THE STATES, THESE ACTS AFFECT ONLY EMPLOYERS AND EMPLOYEES ENGAGED IN INTERSTATE COMMERCE; IN THE TERRITORY, THEY AFFECT EMPLOYERS AND EMPLOYEES IN INTRA-TERRITORIAL COMMERCE AS WELL AS COMMERCE BETWEEN THE TERRITORY AND THE SEVERAL STATES, AND THEY THUS COVER EVERY PHASE OF EMPLOYER-EMPLOYEE RELATIONSHIP IN THE TERRITORY, EXCEPTING ONLY IN RESPECT TO INDUSTRIES EXEMPTED FROM THE COVERAGE OF THE ACTS, SUCH AS AGRICULTURE.

APPELLANTS URGE THAT IN THE LIGHT OF THIS FIXED, UNDEVIATING POLICY OF EXTENDING NATIONAL LABOR LEGISLATION TO THE TERRITORY, AN INTENT TO EXCLUDE THE LABORING MEN OF THE TERRITORY FROM ONE OF A SERIES OF INTERRELATED ACTS AFFECTING LABOR SHOULD NOT BE PRESUMED IN THE ABSENCE OF ANY FACT MAKING THAT EXCLUSION MANDATORY.

On annexation of the Territory, Congress immediately took cognizance of the conditions of labor and in the Organic Act[17] itself, relieved workers from the serfdom of indentured labor contracts.[18]

Labor in the Territory organized or attempted to organize, and to strike before the passage of the Norris-LaGuardia Act. There were Territory-wide organizations and Territory-wide strikes even on plantations, but these organizations could not withstand the combined power of the employer and the Government. This combined power was perhaps most frequently exercised in labor disputes on the criminal side of the court, the employer-paid lawyers being designated by the Attorney General as special prosecutors of "higher wage conspiracies" and unlawful assemblies.

The labor injunction, however, was likewise frequently employed when no criminal charge could be found or fabricated. On July 9, 1909, for example, during the 1909 Japanese strike, a Circuit Court judge issued an injunction against the Nippu Jiji, a Japanese newspaper, ordering it to put an end to articles that included threats of boycott or ostracism, and enjoining 33 strike leaders from committing

[17] Section 10, which provides in part: "That no suit or proceeding shall be maintained for the specific performance of any contract heretofore or hereafter entered into for personal labor or services, nor shall any remedy exist or be enforced for breach of any such contract except in a civil suit or proceeding instituted solely to recover damages for such breach," and further declaring contracts for personal services for a definite term made after August 12, 1898, null and void.

[18] The Report of the Attorney General of the Territory in 1890 shows that 5,387 persons were convicted for violation of these contracts for the biennial period ending March 31, 1890.

any acts of violence and from picketing any places where employees of the Oahu Sugar Company and other Japanese laborers frequented for the purpose of intimidating them.[19]

Between 1932 when the Norris-LaGuardia Act was passed, and 1938, counsel has been able to find no record of an injunction being issued in a case growing out of a labor dispute. In 1938, when an injunction was applied for to prohibit picketing, the injunction was denied by then Circuit Court Judge LeBaron who wrote the opinion below on the ground that the Norris-LaGuardia Act removed jurisdiction from the Circuit Court to issue such injunctions.[20]

From 1938, when Judge LeBaron ruled the Norris-LaGuardia Act applicable to circuit courts of the Territory, until 1946, no injunctions were issued in labor disputes, until Judge Rice, and then Judge Wirtz, granted ex parte restraining orders without complying with the Norris-LaGuardia Act.

V

THE COURT MISUNDERSTOOD, AND CONSEQUENTLY DID NOT GIVE CONSIDERATION TO, APPELLANTS' CONTENTION WITH RESPECT TO THE APPLICATION OF THE SHERMAN AND CLAYTON ACTS, AND THE AMENDATORY NORRIS-LAGUARDIA ACT TO THE TERRITORY OF HAWAII.

This contention has a twofold aspect: First, the substantive rights created by these acts specifically

[19] Pacific Commercial Advertiser, July 9, 1909.
[20] See Appendix for full text of this opinion.

inure to persons in the Territory.[21] Consequently, no territorial court has jurisdiction to enjoin the exercise of these federal substantive rights, regardless of whether the procedural provisions of the Act apply in terms to these courts. Second, the procedural limitations apply to territorial courts, including circuit courts in issuing injunctions in labor disputes. Both contentions go to the question of jurisdiction of the court. No court has jurisdiction to enjoin lawful conduct.

Even if the court holds to the construction it has given of the legislative definition, consideration should be given to the question of jurisdiction raised by appellants' argument on substantive rights.

The Sherman Act of July 2, 1890, was in force at the time of the annexation of the Republic of Hawaii to the United States. The Sherman Act specifically applied to commerce in and within Territories of the United States. It became a part of the laws of the Territory by virtue of the provisions of Section 5 of the Organic Act.[22]

When the Clayton Act was adopted on October 15, 1914, its provisions relating both to monopolies and conspiracies in restraint of trade and to labor's rights were respectively applicable to commerce in and within the territory, and to all persons, associations and corporations in the Territory.

The Supreme Court has specifically held that the unenjoinable conduct in the Clayton Act as redefined in the Norris-LaGuardia Act is legal under all

[21] 29 U.S.C.A. 52, 53.
[22] 48 U.S.C.A. 495.

laws of the United States, including the Sherman Act. The Territorial legislature cannot legalize the illegal acts in the anti-trust provisions of the act, nor can it make illegal the trade union activity that is specifically legalized.

Since the Norris-LaGuardia Act amends these two Acts and since its purpose was to restore the broad purposes which Congress thought it had formulated by Sections 6 and 20 of the Clayton Act, the later act must be given the same scope geographically and as to persons affected as the two preceding acts.

Appellants make no contention, as the court seems to assume, that powers to enforce the provisions of the anti-trust laws or the procedural and jurisdictional limitations set forth in Section 20 of the Clayton Act apply to territorial circuit courts. But appellants do contend that the words "courts of the United States" in Section 20 includes the territorial federal district court, and the phrase "any district court of the United States" used elsewhere in the act includes the territorial federal district court, and that this Act being applicable to the Territory, the substantive rights under it are effective in the Territory.

Since these laws are specifically "locally applicable," all territorial law must be consistent with them. For any territorial agent, legislative, executive or judicial, exercising power delegated by Congress to attempt to declare conduct Congress has declared legal a crime or to deny the right to engage in the conduct by restraining it would not be consistent

with these laws. In other words, so far as the Territory is concerned, Congress in the Organic Act placed laws of the United States "not locally inapplicable" on the same plane as the Constitution.

Prior to the passage of the Clayton and Norris-LaGuardia Act, territorial circuit courts had equitable jurisdiction "according to the usage and practice of courts of equity . . ."[23] The cases that Congress legislatively disapproved, restraining strikes, picketing, communication or association either on the ground that they were criminal conspiracies or in violation of the anti-trust laws from the first case in 1893 applying the Sherman Act to union activity through the Bedford Cut Stone case represent the "usage and practice of courts of equity" in issuing injunctions in labor disputes. The Norris-LaGuardia Act was passed because Congress believed that "the usage and practice of courts of equity" in issuing injunctions in labor disputes, and punishing strikers for contempt of such injunctions "violated the conscience of civilization."[24]

Senator Norris, in presenting the bill to the Senate, stated:

> Section 5 says that the doing of these acts shall not be held by a court to be a conspiracy. *In Section 4 we already say they are legal* and no injunction shall be issued against anyone, even though there are several of them who have agreed to unite in any one of them.

[23] Revised Laws of Hawaii, 1945, Section 12402.

[24] Senate Report, *op. cit.*, p. 18.

And after quoting with explanatory comments each of the "legal" provisions of Section 4:

> Is there anybody who objects to any one of those recitals? Is there any one of them that is unfair? This amendment simply provides that *two or more* laboring men who agree to do any one of the acts I have enumerated shall not be held to be guilty of a conspiracy. What is wrong about that? I ask any fair-minded man on earth? In any other case except a case involving a labor dispute one would be laughed out of court if he tried to charge a conspiracy on evidence as to any of the acts enumerated in the provisions I have read. Such a charge would apply nowhere and never has been made, so far as I know, except against men who toil, and as a rule, against men who toil down in the bowels of the earth in the mines.

Senator Bratton asserted:

> The difference is that *the acts enumerated in section four* are perfectly legal.

Senator Norris replied:

> We have declared them to be so, although it ought not to be necessary to do so.[25]

If a territorial circuit court judge can issue an ex parte restraining order, providing

> You are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets stationed at points of ingress and egress,

[25] Congressional Record, Volume 75, part 5, p. 4931.

labor in Hawaii is back to the point at which Congress began in the Clayton Act, back to the days when picketing was "sinister," a lone "missionary" only being allowable.

If this can be, Judge Benson Hough aptly wrote the law and epitaph for labor in the Territory in his injunction against the United Mine Workers which Congress condemned as one of the worst:

> Persuasion in the presence of three of more persons congregated with the persuader is not peaceful persuasion, and is hereby prohibited.[26]

VI

THE DECISION OF THIS COURT, RESTING AS IT DOES ON THE PROPOSITION THAT THE NORRIS-LAGUARDIA ACT APPLIES ONLY TO INFERIOR FEDERAL COURTS CREATED UNDER ARTICLE III OF THE CONSTITUTION, IS IN CONFLICT WITH AN UNAPPEALED, AND UNCONTESTED RULING OF THE FEDERAL DISTRICT COURT OF THE TERRITORY OF HAWAII IN *Alesna v. Rice*, No. 11, 872 IN THE RECORDS OF THIS COURT, AS WELL AS WITH *Hall v. Hawaiian Pineapple Co.*, 72 F. Supp. 533.

Those cases hold that the Norris-LaGuardia Act applies to the Territory and limits the jurisdiction of the federal District Court of the Territory in the issuance of injunctions in labor disputes. The territorial federal district court is a legislative court created under Article IV of the Constitution, as are the territorial circuit and supreme courts. The

[26] Frankfurter & Greene, The Labor Injunction, Appendices, p. 266.

court's decision cannot rest on the proposition that Congress intended to affect only inferior federal courts under Article III without nullifying the express provisions of the Clayton Act, and the Norris-LaGuardia Act in its entirety in the Territory.

Appellants believe that the court will find that the issues raised in *Alesna v. Rice* present all aspects of the question of the application of these interrelated Acts to the Territory.

CONCLUSION

For the foregoing reasons appellants respectfully request the court to grant their petition for a rehearing and reargument in this case.

If the court sees fit to grant this petition, appellants respectfully suggest that reargument be consolidated with the argument in *Alesna v. Rice,* now set for December 9, 1948.

Dated: Honolulu, T. H., November 10, 1948.

Respectfully submitted,

HARRIET BOUSLOG,
Attorney for Appellants.

I hereby certify that the within petition for rehearing is not interposed for purposes of delay.

HARRIET BOUSLOG,
Attorney for Appellants.

Appendix

IN THE

Circuit Court of the First Judicial Circuit

TERRITORY OF HAWAII

At Chambers in Equity

JOSEPH F. NEVES and LEWIS PERKINS WILLIAMS, copartners doing business as RIALTO BEER GARDEN, *Petitioners,* vs. CARL REBER, ALBERT (ALKY) DAWSON, JOHN SANTIAGO GOMES, WILBUR K. HALL, BELLA MOORE, ALICE HAVENS, CHESTER PERKOWSKY, MADELINE MORRIS, WHITEY ALLEN, ROY OWENS, ART RUTLEDGE, ELMER WATKINS, JOHN DOE and RICHARD ROE, constituting the HOTEL, RESTAURANT AND BAR CATERING ASSOCIATION, LOCAL NO. 5; and MARY MOE and DAN DOE, *Respondents.*	**Equity 3948** **Bill for Injunction and Other Relief**

DECISION ON MOTION

The sole question before this Court as raised by the Motion of the Petitioners is one of jurisdiction, i.e. jurisdiction to issue a restraining order upon the Motion for Temporary Restraining Order and Affidavits filed herein by the Petitioners without con-

forming with the provisions of the "Norris-LaGuardia Act."

The instant the "Norris-LaGuardia Act" was presented to this Court, it ruled from the bench that the Temporary Restraining Order, issued the day before, was issued in violation of the "Norris-LaGuardia Act" and dissolved said Restraining Order forthwith. In other words, the Court in effect ruled that this Court is a "court of the United States" as defined in said Act, and that therefore it did not have jurisdiction to so issue a restraining Order in this case without strict conformity with the provisions of the "Norris-LaGuardia Act."

The Motion of the Petitioners challenges the soundness of the Court's ruling from the bench, and its Order dissolving the Temporary Restraining Order, on the theory that this Court is not a "court of the United States" as defined in Section 113(d) of the "Norris-LaGuardia Act."

It is clear and it is conceded by the attorneys for the Petitioners as well as by the attorney for the Respondents that, if this Court is a "court of the United States" as defined in Section 113(d) of the "Norris-LaGuardia Act," it had not the jurisdiction to issue the Restraining Order in question without strict conformity with the provisions of the Act.

A casual reading of the Petition, Motion for a Temporary Restraining Order and Affidavits, together with Section 101 of the Act, will convince the most skeptical mind of this fact, for this clearly is a case involving or growing out of a labor dispute.

The provisions of Section 101 are as follows:

> "... no court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter. (Mar. 23, 1932, c. 90, Par. 1, 47 Stat. 70.)"

The remaining question therefore to be answered, is whether or not this Court is a "court of the United States" within the meaning and definition of the Act. It will be noted that Congress, in using the term "court of the United States" in Section 101 of the Act, specifies it "as defined in this chapter."

Within the same chapter, appears Section 113, which is obviously the definition referred to in Section 101, for paragraph (d) of Section 113 defines the term "court of the United States." It reads as follows:

> "Section 113. Definition of terms and words used in chapter. When used in this chapter, and for the purposes of this chapter * * *
>
> (d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the Courts of the District of Columbia. (Mar. 23, 1932, c. 90, Par. 13, 47 Stat. 73.)"

Before attempting to construe the intent and meaning of this definition, it might be well to consider the pre-existing judicial constructions of the same term, i.e. "court of the United States" and the usual meaning and understanding which that term has previously been intended to have and to connote, by legislatures, by Congress and by judicial construction.

There can be no question that the term "court or courts of the United States" has gathered to it by usage, by popular understanding and by judicial construction a peculiar and well defined legal significance which connotes, describes and pictures the strictly Federal Courts of the United States and the Federal court system. These strictly Federal Courts are distinguished from the other courts of America by their name, such as the District Courts of the United States, and by their strictly Federal jurisdiction dealing with the laws of the United States. This term has therefore been used to only apply to this type of Federal Courts in spite of the fact that there are other courts of America which are also Federal in nature, as for example the Courts of the District of Columbia and the Territorial Courts of Hawaii. These latter Courts are not Federal in name nor in jurisdiction, but are Federal only to the extent that they are creatures of Congress and their Judges are appointed and receive their salary in the same manner as do the aforementioned strictly Federal Courts. Nevertheless, due to the name of the strictly Federal Courts and to their jurisdiction in administering the

laws of the United States, the strictly Federal Courts only have been so designated by the term "courts of the United States." Such clearly is the legal significance of this term outside of and apart from its use and definition in Chapter 6 of the "Norris-LaGuardia Act."

With this settled and pre-existing construction and understanding as to the meaning of this term, counsel for the Petitioners very timely presents the argument that "Congress in passing the Norris-LaGuardia Act must be presumed to have acted with knowledge of the recognized distinction between Courts of the United States . . . and Territorial Courts" and calls attention to the rule as stated in 59 Corpus Juris 1008 as follows: "Thus it has been presumed that a legislature in passing a statute, knew its own intention and of the judicial decisions under the pre-existing law" and that "in the construction of a statute it will be presumed that the legislature understood the meaning of the words used, that it intended to use them . . . in a technical sense, if they have a well settled technical meaning, or if they have a well defined legal significance, that they were used in that sense."

All these contentions and rules advanced by counsel for the Petitioners are sound and guide this Court in its construction of the definition before it.

However, it will be noted that the well defined legal significance of the term in question is a general one where the term is used with a certain degree of casualness in the body of the various legislative

acts, regulations and rules of court or wherever found. It was used as a term to divide and segregate all the American Courts into two large groups, i.e. Federal Courts and non-Federal Courts. It recognized the Courts in the Federal system as different and distinct from the Courts in the territorial, legislative and state systems.

To this general classification, which Congress is presumed to know, comes a more specific definition of the same term for the special use and purpose of a particular chapter in the "Norris-LaGuardia Act" of Congress. No one can doubt the power, right and propriety of Congress to thus make its own definition to carry out its own particular intent and purpose in any legislation.

This new definition may either broaden or narrow, or it may merely confirm the existing well defined legal significance which has attached itself to the term in question, but the new definition for obvious reasons must be conclusive for the particular use and purpose for which it is created.

Such a definition is Section 113(d) and the Court must therefore construe it as a definition.

There are two cardinal requirements of a definition. The first is that a definition should state the essential attributes of the thing to be defined by first placing it into the class or genus to which it belongs and then to enumerate the differentiae, or specific marks or traits which distinguish it from other members of the same class or genus.

The second cardinal requirement of a definition

is that it shall not contain the term or word to be defined, nor even any term or word which is directly synonymous with it.

With these two requirements the Court will look at the first part of the definition (d) of Section 113. It reads as follows:

> "The term 'court of the United States' means any court of the United States . . ."

Under the first rule of definition cited, the words "any court of the United States" should be the class to which the term to be defined belongs.

The next part of the definition is the following clause:

> "whose jurisdiction has been or may be conferred or defined or limited by Act of Congress . . ."

For the same reason this clause should be the differentiae or specific marks or traits which distinguish it from other members of the same class.

The last part of the definition is the following phrase:

> "including the courts of the District of Columbia."

This phrase should also be part of the differentiae and be descriptive of the term to be defined by setting out a type of court as an example meant in the rest of the definition.

Counsel for the Petitioners, however, argues that both terms, i.e. "court of the United States" used in the definition mean one and the same thing by virtue of the past well defined legal significance which has been attached to it and that Congress must be pre-

sumed to have so intended the term to mean strictly Federal Courts and that the inclusion of the courts of the District of Columbia by inference excludes the Territorial Courts. Such a construction of the definition would flagrantly violate the two cardinal requirements of a definition and is a clear case of reasoning in circles or begging the question, i.e. a form of petitio principii which would in turn completely annihilate Section 113(d) as an effective definition contrary to the plain and clear intention of Congress that it be a definition. It would in effect be construing Section 113(d) to make it say that strictly Federal courts mean strictly Federal courts. It would be attempting to define a term by means of the term itself. Such would destroy the meaning of the term or the definiendum and make of Section 113(d) a meaningless and unnecessary statement, contrary to the intention of Congress.

It is too well settled to admit of argument that a court should never so construe a legislative act as to make it into an absurdity. The Court therefore is forced by all the rules of logic and of construction to reject counsel's argument and will instead follow the plain and clear intention of Congress.

The key to the first of the definition of Section 113(d) is the meaning of the word "of." In using its definition and synonyms, the meaning of the entire Section becomes clear. The word "of" indicates origin or source. Thus the Court construes the intent and meaning of Congress to the first part of its definition to read as follows:

The term "court of the United States" means any court of or proceeding from or belonging to, or relating to or connected with or concerning the United States, etc.

Such a construction places the term to be defined into its proper class and makes Section 113(d) in its entirety into a sound and logical definition, which is clearly the intent of Congress.

The effect of this new definition of Congress is to broaden and enlarge upon the old definition, understanding and legal significance of the term in question, so that it shall include not only the strictly Federal Courts such as the District Courts of the United States, but also the non-strictly Federal Courts such as the Territorial Courts of Hawaii and the Courts of the District of Columbia. The definition in other words groups together all the Federal Courts of the United States whose jurisdiction has been or may be conferred, defined or limited by Act of Congress. Such a definition became absolutely necessary to Congress to carry out its intention and the policy of the United States. Otherwise the pre-existing and limited use and legal significance of this term would have defeated the intention and purpose of Congress.

This liberal and reasonable construction of a remedial Act designed to benefit the individual unorganized worker of the Nation from his apparent helplessness to exercise his actual liberty of contract and to protect his freedom of labor wherever there are courts whose source and origin proceed from the United States and whose jurisdiction is conferred,

defined or limited by Act of Congress, is clearly consistent with the policy of the United States as expressed in Section 102 of the "Norris-LaGuardia Act."

In the interpretation of Section 113(d), this policy of the United States is material for it shows a national application under the prevailing economic conditions of the United States to extend the benefits of the Act to all the intended recipients thereof under the flag of the United States wherever exists this broad type of Federal Court.

Such an interpretation explains why Congress added the last phrase to its definition in Section 113(d), i.e. "including the courts of the District of Columbia" as an example of the courts defined. In the District of Columbia is the Capital of the Nation, from which Congress clearly intended that the benefits of the Act should not only begin, but extend outwardly in the manner prescribed by the Act.

The remaining question is whether or not this Court as a Territorial Court comes within the definition of Congress.

First it is clear that it belongs to the general class of courts first stated in the definition. Its judges are appointed by the President of the United States by and with the consent and advice of the Senate of the United States, whose salaries are paid out of an appropriation by Congress by the Treasurer of the United States.

This Court also comes within the second and defining part of the difinens of the Section in that its

jurisdiction was conferred by Act of Congress (Section 81 of the Organic Act) which granted to it part of the Judicial Power of the Territory and confirmed its jurisdiction by continuing it in force. This Court's jurisdiction has already been limited in the matter of divorce by Act of Congress (Section 55 of the Organic Act), which clearly shows the control of its jurisdiction by Congress and that Congress may at any time further limit or define its jurisdiction.

Consequently, this Court meets and comes within every phase of the definition given by Congress as well as the public policy of the United States as expressed by Congress.

Wherefore, this being a Court of the United States within the meaning and purview of the "Norris-LaGuardia Act," this Court was right in ordering that the Restraining Order be forthwith dissolved as contrary to Section 101 of the Act aforesaid.

This conclusively settles the question raised by the Motion of the Petitioners and therefore the matter of the applicability of the "Wagner Act" to Section 6120 R.L.H. 1935, known as the Picketing Law, need not be here decided.

WHEREFORE the Motion of Petitioners to set aside the Court's ruling dissolving the Temporary Restraining Order is overruled and denied.

DATED: Honolulu, T. H., June 21st, 1938.

Louis Le Baron
First Judge, First Circuit Court,
Territory of Hawaii.